IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 16TH NOVEMBER 2006 / 25TH KARTHIKA 1928

CRL.A.No. 632 of 2006(A)

SC.637/2000 of
CP.74/1999 of JUDL.MAGISTRATE OF FIRST CLASS-I, PUNALUR

.....

APPELLANT:

SACHIDANANDAN, S/O. VASU,
C.NO.9991, CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM-695 012.

BY ADV. ADV.SABU GEORGE(STATE BRIEF)

RESPONDENT:

THE STATE OF KERALA, THROUGH
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13/11/2006, THE COURT ON 16/11/2006 DELIVERED THE FOLLOWING:

K.Thankappan, J.

- -

Crl. A. No. 632 of 2006

- -

Dated this the day 16th of November, 2006

JUDMENT

The appellant was charge-sheeted for the offences punishable under section 55(a) and (i) of the Abkari Act on the allegation that he was found in possession and engaged in the sale of 7 litres of arrack-blended toddy in a 10 litre black jerry can with a steel tumbler on the way lying on the eastern side of the shop building situated in Kelayathukonathu on the western side of the Ezhamkulam Junction. To prove the charge against the appellant, the prosecution examined PW1 to PW3 and Exts.P1 to P5 were marked. Material objects MO1 and MO2 were also marked. After closing the evidence, the appellant was questioned under seciton 313 of Cr.P.C. He denied the commission of offence alleged against him and stated that he case was foisted against him at the instigation of the owner of Archana Shop.

2. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) and (i) of the the Abkari Act and he was sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.1,00,000/- each for offences under sections 55(a) and (i) of the the Abkari Act and in

default to undergo rigorous imprisonment for a further period of six months each. The benefit under section 428 Cr.P.C. was granted. The above conviction and sentence are under challenge in this appeal.

3. State brief was appointed for appearing for the appellant. The learned counsel for the appellant submits that the police officials, who registered the crime, prepared the documents with regard to the seizure of the contraband article and taking of the sample , have not complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual. The learned counsel also submits that the ingredients of section 55(a) of the the Abkari Act are not satisfied to convict the appellant under the above section.

4. The learned Public Prosecutor submits that the trial court has correctly appreciated the evidence and hence the appeal has to be dismissed confirming the conviction and sentence awarded against the appellant.

5. The prosecution case against the appellant is that he was found in possession of 7 litres of arrack blended with toddy in a 10 litre black jerry can and he was selling the same. The evidence of PW2 and PW3 would show that on 23-6-1999 at 7 P.M.when they reached the place of occurrence, they found the appellant pouring some liquid into MO2 from MO1 and on seeing the police party, the appellant attempted to ran away by

leaving MO1 and MO2. The evidence would also show that when the appellant was questioned, he confessed that he was conducting sale of arrack.

6. PW1 is an independent witness who attested Ext.P1 seizure mahazar. PW2 and PW3 are police officials. PW3 is the Sub Inspector of Police who detected the offence. PW2 and PW3 have given evidence in terms of the prosecution case. The prosecution relies on Ext.P5 chemical analysis report, which would show that the sample contained ethyl alcohol.

7. Question to be answered is whether the appellant can be convicted under section 55(a) of the Abkari Act or not?

8. Section 55 of the the Abkari Act reads as follows:-

> "55. For illegal import, etc:- Whoever in contravention of this Act or of any rule or order made under this Act
>
> a) imports, exports, transports, transits or possesses liquor or any intoxicating drug; or
>
> xxxx xxxx xxxx xxxxx
>
> shall be punishable
>
> 1) for any offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh and

9. Section 58 deals with for possession of illicit liquor, which reads as follows:-

> "58. For possession of illicit liquor:- Whoever, without lawful authority, has in his possession any liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this Act not to have been paid therefor, shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lash."

Resultantly, it is clear that when a person is in possession of illicit liquor, the case would fall within section 58 of the the Abkari Act. The above question was considered by a Division Bench of this Court in a decision reported in Surendran V. Excise Inspector (2004 (1) KLT 404). In the above decision this Court held that when a person was in possession of liquor while illegally importing it the case would be covered under section 55(a) and in a case where the possession was of illicit liquor it would fall within section 58 of the Abkari Act. The prosecution case against the appellant is that he was found in possession of liquor. But there was no evidence to show that it was in the course of importing, exporting or transporting. A possession simplicitor unless qualified by other action is not an offence under section 55(a) of the the Abkari Act. Section 55 deals with different and distinct offences though punishments are same except for

clauses (d) and (e).

10. The next question to be considered is whether Ext.P5 chemical analysis report can be relied on to find the appellant guilty of the alleged offence. The learned counsel invited the attention of this Court to three decisions of this Court reported in Narayani V. Excise Inspector (2002(3) KLT 725), Alex V. State of Kerala (2003 (1) KLT S.N.9), Dominic V. State of Kerala (1989(1) KLT 601) and a decision of the Apex Court reported in Dhanjaya Reddy V. State of Karnataka ((2001)4 SCC 9).In the decision reported in Narayani V. Excise Inspector (2002(3) KLT 725 this Court had taken a view that "**the prosecution has not proved that residue and sample were kept in the proper custody till those items were produced in court on 13-9-1995 and chance of tampering cannot be ruled out, benefit of doubt is to be given to the accused".** In Alex V. State of Kerala (2003(1) KLT SN 9) this Court had taken the view that the seizure should be reported to court forthwith. In Dominic V. State of Kerala (1989(1) KLT 601 this Court had taken the view that "**when S.36 of the Abkari Act and paragraphs 17,26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis**'. As per the decision of the Apex Court in Dhanjaya Reddy V. State of

Karnataka (Supra), a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. It has come out in evidence that the contraband article was produced before the court only on 23-7-1999, after one month of the detection of the crime. No proper explanation was given by PW2 or PW3 regarding the delay. In the above circumstances, this Court is of the view that the evidence adduced by the prosecution to prove the case against the appellant is not free from doubt and hence the prosecution failed to prove the case against the appellant beyond reasonable doubt.

11. In the circumstances, the conviction and sentence ordered against the appellant under section 55(a) and (i) of the the Abkari Act are set aside and the appellant is acquitted. The appellant shall be released forthwith unless required in any other case. Accordingly, the appeal is allowed.

K. Thankappan,
Judge.

K. Thankappan,J.

- - - - - - - - - - - - - - - - -

Crl.A. No. 632 /2006

- - - - - - - - - - - - - - - - -

<u>Gist of the Judgment</u>
16-11-2006